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I. NATURE OF THE CASE

Denise Colbert drowned in Lake Tapps. Her father, who was not present when she drowned, is pursuing a bystander emotional distress claim.

Because he was not present, because he did not see the accident, because he did not arrive “shortly thereafter,” and because he witnessed no suffering, the trial court dismissed his claim on summary judgment.

II. RESUME OF PLEADINGS AND PROCEEDINGS

In December 2003 appellant Jay Colbert filed this lawsuit. (CP 1-6) He sued as the personal representative of the estate of Denise Colbert and he sued for himself. (*Id.*)

He sued three Tennessee corporations¹ and an Oklahoma corporation² alleging that each had some connection to the boat on which Denise Colbert was a passenger on the night she drowned. Plaintiff alleged negligence, strict product liability, and breach of warranty. (*Id.*)

Defendant Skier’s Choice answered (CP 7-10), denied liability, and set out several affirmative defenses (CP 9).

¹ Moomba Sports, Inc.; United Marine; and American Marine.

² Skier’s Choice, Inc. The corporate defendant respondents will be referred to collectively as Skier’s Choice.

In October 2004, the parties stipulated that plaintiff could file a first amended complaint. (CP 11-17) It (CP 18-22) added a claim of negligent infliction of emotional distress.

In November 2004, plaintiff filed a motion for partial summary judgment (CP 23-35) with 13 attachments (CP 36-226). Plaintiff sought a ruling that the boat was not reasonably safe due to lack of adequate warnings. (CP 23) The medical examiner's report, submitted by plaintiff (CP 38-59), indicated that decedent had consumed alcohol with her friends throughout the night (CP 39, 41), and that after leaving a nearby bar at closing they had continued the party at Lake Tapps. At about 3:00 a.m., the decedent went under water and did not surface. 911 was called. Decedent's body was found at about 6:00 a.m. (CP 41)

The cause of death was "drowning" with "ethanol toxicity," and "carbon monoxide" noted as significant. (CP 44) The blood alcohol level was 0.12 g/100 ml. (CP 50)

The incident report indicated that all witnesses suggested different areas for the "last scene [sic] point." (CP 58) It was decided that the incident would transition "to a recovery mode." (CP 59)

In his declaration, plaintiff, the decedent's father, said he got a phone call at home. (CP 71) He was told that his daughter had fallen off a boat and was missing. (CP 72) When he got to the lake lights were

flashing from a boat, the police and rescue workers were there. (CP 72)
After dawn he saw a buoy pop up to the surface and he “had an idea what that meant.” (CP 74)

Respondent defendant Skier’s Choice responded to the motion. (CP 227-47) It reviewed the boat’s warnings, and its ownership history. (CP 228-33) It also reviewed Ms. Colbert’s drinking activity during the evening (CP 233-34) which included margaritas, mixed drinks, and beer. (CP 233) At about 1:30 a.m., she and nine other individuals boarded Marc Jacobi’s 18.5-foot boat. (CP 233) The maximum capacity of the boat was five. (CP 234, n.3)

Additional details of the accident were supplied. Around 3:00 a.m., after an hour and a half in the water, Ms. Colbert and her friend, Lindsay Lynam, were holding on to the swimmer’s platform at the rear of Mr. Jacobi’s boat as it headed toward shore. (CP 234) Neither Ms. Colbert nor Ms. Lynam was wearing a life jacket. (CP 94, 234) There was a placard on the stern of Mr. Jacobi’s boat prohibiting people from being on or near the swim platform when the engine was running. (CP 234) Mr. Jacobi took no steps to move Ms. Colbert and Ms. Lynam. (CP 234)

Ms. Colbert and Ms. Lynam decided to resume swimming. (CP 263) They let go of Mr. Jacobi’s boat and started swimming.

(CP 263-64) They swam for a minute or two. They were laughing and talking. (CP 265) They were really close to the shore. (CP 265) “All of a sudden she was gone. We were just swimming, and then she went under. There wasn’t a struggle or anything.” (CP 265; Lynam Dep. p. 39)

The parties filed additional material on the failure to warn issue. (CP 273-79, 280-305, 306-10, 311-14) On February 11, 2005, the court entered an order denying the plaintiff’s motion for partial summary judgment. (CP 329-31)

The plaintiff filed a second amended complaint adding the owner of the boat, Marc Jacobi, as a defendant. (CP 315-20) Mr. Jacobi answered (CP 386-89) denying liability and affirmatively pleading that any fault be apportioned among all parties.

Respondent Skier’s Choice filed a motion for partial summary judgment. (CP 366-85) That motion pointed out that there was no contractual privity and thus no breach of warranty claim. Also, there being no qualified statutory beneficiaries, the estate’s claim for non-economic loss could not be maintained. Finally, Mr. Colbert’s bystander emotional distress claim had to be dismissed because he was not present when the accident occurred, was not present “shortly after” the accident, and did not witness any suffering on the part of his daughter. (CP 366-67)

Further details of the accident were supplied. At about 3:00 a.m., Mr. Colbert had received a call and was told that his daughter had fallen overboard and they could not find her. (CP 357, 360) He arranged for neighbors to watch his other children. (CP 358) He then drove the five minutes to the lake. (CP 358) He saw the police cars. (CP 359-60) He saw lights flashing from a boat on the lake. (CP 351) He knew they were searching for his daughter. (CP 351) He did not want to get out of his car. (CP 351) He did not join the search group at Mr. Jacobi's dock. Instead, he drove to a friend's place and watched the recovery effort from his dock. (CP 352, 369) Mr. Colbert did not speak to the officers or anyone else at the scene. (CP 360)

Mr. Colbert's counsel responded to the motion. (CP 401-24, 425-507) It was agreed that the breach of warranty and non-economic claim should be stricken. (CP 402) As to the bystander claim, counsel argued that there was a cause of action because "Mr. Colbert was physically present at the Lake Tapps scene where his daughter died, witnessing hours of search and rescue efforts, as well as the removal of his daughter's body from the water." (CP 403)

Skier's Choice replied (CP 535-42), pointing out that no case law supported the claim, that Mr. Colbert did not witness his daughter drowning, was told of the drowning by a third party, and only saw his

daughter's body for an instant from 100 yards away, three hours after she drowned. In particular, it was pointed out that plaintiff's counsel had misconstrued the operative language of Washington case law. (CP 536) In Washington, while a bystander plaintiff need not be an actual witness to the accident, he must at least arrive on the scene of the accident shortly thereafter and witness the victim's suffering, experience the shock of seeing the victim shortly after the accident, or witness the victim's injuries. (CP 536) Inasmuch as Mr. Colbert was not a witness to the accident, did not experience the shock of seeing graphic injuries shortly after the accident, or witness the victim suffering, his claim had to be dismissed. (CP 536)

The motion was argued April 22, 2005. (RP 2) At the conclusion of the argument, Judge Katherine Stolz announced her decision (RP 14-15)³:

THE COURT: All right. Well, one of the problems when you're sitting up here is that this case is about the death of a young girl and that is a tragic, tragic incident. The law requires that we act impartially setting our own emotions aside. I reviewed the cases that were cited in this matter

³ To assist the reader, we set out this quotation double-spaced.

and the crux of the emotional distress is that you have to be present within a short period of time to view the victim's suffering. That doesn't apply here.

If I were to deny the motion I would be extending this out to any parent who is called and told their child has been in an automobile accident and has been taken to a hospital. The child might have been rescued from a drowning incident but still alive but in a coma, they go to the hospital and you could then say they're having emotional distress because they had to sit and watch their child die within three hours or five hours or what have you. I'm not going to go there that far with the law.

If the Court of Appeals on review wishes to extend or the Supreme Court wishes to extend it that will be their prerogative. The way the law is worded right now Mr. Colbert is not covered for emotional distress. He was called, went there, already advised she'd gone off the boat into the water and must have known it was a high probability she would have drowned. Watched the recovery effort for three hours but did not witness any pain,

suffering or the like. A parent is going to be devastated any time their child dies before they do. Whether it's heart attack, auto accident or a drowning accident.

But this case is outside is outside the parameters of the law as it is now. And therefore, I'll grant the summary judgment motion.

The trial court signed the summary judgment order on April 22, 2005. (CP 543-45) Mr. Colbert moved to certify the order (CP 563-67), supported by counsel's declaration. (CP 568-82) Skier's Choice opposed the motion. (CP 583-95) Mr. Colbert replied. (CP 596-601) The court denied certification of the partial summary judgment. (CP 602-04)

The estate then non-suited its claims. (CP 554-56, 557-58) Mr. Colbert filed a Notice of Appeal on May 20, 2005. (CP 546-53)

III. STATEMENT OF THE FACTS

Appellant's factual review requires some correction and clarification. At page 4, footnote 1, appellant states that the cause of death was "carbon monoxide from the boat's exhaust" and cites to "CP 483." The statement is in error⁴. The cite is to the "Toxicology Report" which says nothing about the cause of death. The cause of death is set out in the medical examiner's report. (CP 44) The cause of death was "drowning." The examiner also noted as another significant condition, "ethanol toxicity" and "carbon monoxide." (CP 44)

Missing from appellant's statement is a clear indication of the passage of time. Mr. Jacobi, the owner of the boat, testified that Denise was lost at 3 a.m. or 3:30 a.m. (CP 99) Mr. Jacobi called 911 right away. (CP 97)⁵ He was on the phone with 911 for the next 15 minutes. (CP 97) The rescue people arrived within 20 minutes. (CP 99) After Denise had gone under, everyone started looking for her. (CP 97) Kyle jumped in the water to try to find her. (CP 97) Later, Kyle called Denise's father. (CP 100) He told him that Denise had fallen overboard (CP 357) and was

⁴ This erroneous statement is repeated on pages 11, 26, and 29. In a similar manner, we find throughout the brief the statement that Mr. Colbert was "physically present" when his daughter drowned. This is not true. Appellant's repeated reliance on such inaccurate statements undercuts his credibility on all statements.

⁵ The medical examiner's report indicates that the 911 call came in at 2:58 a.m. (CP 41)

missing (CP 73). The father went to a neighbor's house to arrange to have them watch his other children. (CP 351) He then drove to the lake, a trip he estimated at five minutes. (CP 358)

When the father arrived at the lake, police cars, ambulances, and the fire department were already there. (CP 359-60, 444) There were lights flashing from a boat on the lake. (CP 72, 351) He knew they were searching for his daughter. (CP 351) He could not imagine his daughter drowning. (CP 73) He did not want to believe she was in the water. (CP 73) He did not join the search group at Mr. Jacobi's dock. (CP 352)

Instead, he got in his car and drove to a friend's house. (CP 360) It was a five-minute drive. (CP 451) It was about 900-1,000 feet across the lake from Mr. Jacobi's dock. (CP 99) He arrived there at about 3:45 a.m. (CP 444) He watched the recovery effort from the friend's dock. (CP 352, 369)

At dawn, the divers were still searching for his daughter. (CP 352) At about 6:00 a.m. her body was located and recovered. (CP 41) The police chaplain informed appellant that the divers had found his daughter and that she had drowned. (CP 74) He had a partial view of the rescue workers taking his daughter from the water, and taking her to a waiting ambulance. (CP 353)

Denise had drowned about three hours earlier. (CP 99) The one eyewitness, Lindsay Lynam, described the last moments this way (CP 265):

Q So you and Denise are swimming along, and then what happens?

A All of a sudden she was gone. We were just swimming, and then she went under. There wasn't a struggle or anything.

IV. ISSUE ON APPEAL

Was the trial court correct when it dismissed the father's bystander tort claim arising from the drowning death of his daughter in view of the fact that the father was not present when she drowned, did not arrive "shortly after" the drowning, and did not witness any suffering on the part of his daughter.

V. ARGUMENT

A. STANDARD OF REVIEW.

This is an appeal from an order granting a summary judgment. In *Van Noy v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001), the Supreme Court set forth the applicable standard of review:

Summary judgment orders are reviewed de novo by this court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 1 P.3d 1167 (2000). In doing so we observe the well-known principle that summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

This Court will affirm an order granting summary judgment when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. CR 56(c); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001). When reasonable minds can reach only one conclusion, questions of fact may be determined as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

The superior court properly granted summary judgment because the appellant father was not present when his daughter drowned, did not arrive “shortly thereafter” the drowning, and did not witness his daughter’s death or suffering.

B. WASHINGTON LAW ON BYSTANDER EMOTIONAL DISTRESS CLAIMS.

A bystander's tort claim for emotional distress was first recognized in Washington in *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976). The plaintiff had been sitting in her living room reading her evening paper. Her husband was in an adjoining room giving a piano lesson. She heard an explosive sound. She went to investigate and discovered the defendant, still in her car, in the plaintiff's utility room. The room was destroyed. Plaintiff stepped into the room and the floor collapsed.

On appeal, the court set out an extensive review of the common law and Washington law dealing with the many questions surrounding negligently caused fright which results in physical injury.

The court indicated that it would test the plaintiff's negligence claim against the established concepts of duty, breach, proximate cause, and injury. *Hunsley*, 87 Wn.2d at 434. The court limited defendant's liability to those who are foreseeably endangered by the defendant's conduct. *Hunsley*, 87 Wn.2d at 436. If the specific harm alleged by the plaintiff was foreseeable to the defendant, he had a duty to avoid it and could be held liable. *Hunsley*, 87 Wn.2d at 435-36. The court further held that "the mental and emotional suffering, to be compensable, must be manifested by objective symptomatology." *Hunsley*, 87 Wn.2d at 436.

In *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987), this court restricted the class of plaintiffs to those who are “actually placed in peril by the defendant’s negligent conduct and to family members present at the time who fear for the one imperiled.” *Cunningham*, 48 Wn. App. at 45. The court reasoned that a liability scheme limited by foreseeability alone was contrary to public policy. *Cunningham*, 48 Wn. App. at 43-45. The plaintiffs in that case were the minor children of a mother who was struck by a vehicle while she was walking on the street. The children did not witness the accident nor did they come upon the scene shortly thereafter. The court concluded that as a matter of law, the children could not recover for the emotional distress.

In *Gain v. Carroll Mill Co., Inc.*, 114 Wn.2d 254, 261, 787 P.2d 553 (1990), the court agreed that relatives of a state trooper who saw a report of his fatal auto accident on the TV news did not have a bystander claim. However, they disagreed on the details of such a claim. The court recognized that specific limitations must be placed on the foreseeability standard and held that mental suffering by a relative “who is not present at the scene of the injury-causing event is unforeseeable as a matter of law.” *Id.* at 260. The court concluded that a plaintiff who viewed an accident on television may not bring a claim for bystander emotional distress. The

court stated that the duty to avoid the negligent infliction of emotional distress

does not extend to those plaintiffs who have a claim for mental distress caused by the negligent bodily injury of a family member, unless they are physically present at the scene of the accident or arrive shortly thereafter. Mental distress where the plaintiffs are not present at the scene of the accident and/or arrive shortly thereafter is unforeseeable as a matter of law.

Id. at 261.

In *Hegel v. McMahon*, 136 Wn.2d 122, 128, 960 P.2d 424 (1998), the court noted that “[t]he significance of the phrase ‘shortly thereafter’ in *Gain* is the center of the controversy in this case.” *Id.* at 128. The court had accepted review of two cases. In one, *Marzolf*, a father came upon the accident scene within 10 minutes of the collision, before the aid crew arrived. He observed his son on the ground still alive, but with his leg cut off and his body about split in half.

In the other case, *Hegel*, a son came upon his father who was lying in the ditch severely injured having been hit by a passing car while pouring gasoline into his car.

Both cases had been dismissed in the trial court because the bystander plaintiffs had not been at the scene when the accident occurred. The court noted that this was the general rule, but that the parties were

asking for a ruling as to whether plaintiffs must actually be at the scene at the time of the accident.

The court, in reviewing the Washington case law, noted how the *Cunningham* court had restricted the broad scope of *Hunsley*. *Hunsley* had created a potentially unlimited liability situation. This very real specter of virtually unlimited liability required that the court draw a definite boundary as to who exactly could bring a bystander claim. *Cunningham* held that bystander claims should be limited to “claimants who were present at the time the victim was imperiled.” 136 Wn.2d at 127.

The court then turned to the *Gain* opinion. Therein the court had recognized that *Hunsley* was too broad as there must be an “outer limit to liability.” *Id.* at 127. It clearly articulated the need for a limit on liability (136 Wn.2d at 127):

We agree with the Court in *Cunningham*, that unless a reasonable limit on the scope of defendants’ liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one. As one court stated:

““It would surely be an unreasonable burden on all human activity if a defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it””

Gain, 114 Wash.2d at 260, 787 P.2d 553 (quoting *Budavari v. Barry*, 176 Cal.App.3d 849, 855, 222 Cal.Rptr. 446

(1986) (quoting *Scherr v. Hilton Hotels Corp.*, 168 Cal.App.3d 908, 214 Cal.Rptr. 393 (1985))).

The *Hegel* court noted that while the *Gain* court had indicated in one place that a bystander relative must be present, in another place it said the bystander relative must be physically present at the scene “or arrive shortly thereafter.” It quoted from *Gain*:

“Mental distress where the plaintiffs are not present at the scene of the accident and/or arrive shortly thereafter is unforeseeable as a matter of law.”

136 Wn.2d at 128.

The *Hegel* court chose not to ignore the “shortly thereafter” language of *Gain*, although, given the facts of *Gain*, the phrase was dictum. It noted that *Gain* did not mandate that a bystander plaintiff must be at the scene at the time of the accident. A cause of action was possible for a bystander plaintiff “who arrives on the scene after the accident has occurred and witnesses the victim’s suffering.” 136 Wn.2d at 130.

The *Hegel* court recognized that a bright line rule was attractive, but felt that such a line would exclude bystander recovery for witnessing a crushed body, cries of pain, or dying words. It quoted from *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986), to illustrate what will be perceived by the bystander:

The kind of shock the tort requires is the result of the immediate aftermath of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases, the

dying words which are really a continuation of the event. The immediate aftermath may be more shocking than the actual impact.

136 Wn.2d at 130.

The court noted that the challenge was to create a rule that acknowledges “the shock of seeing a victim shortly after an accident” without creating liability to every relative who grieves for the victim. *Id.* at 131. The difficulty was to differentiate between the trauma suffered by the family member who views the accident or its aftermath and the grief of a family member upon learning that a relative has been injured or killed. The court identified Connecticut and Wyoming⁶ as states which had adopted “a principled intermediate approach” which limits the scope of liability on the one hand, but allows recovery to bystander relatives “who

⁶ *Clohessy v. Bachelor*, 237 Conn. 31, 52, 675 A.2d 852 (1996) (bystander emotional injury must be caused by “contemporaneous sensory perception of the event” that causes injury or “by viewing the victim immediately after” the event if no material change has occurred with respect to the victim’s location or condition). *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986):

“[The shock] is more than the shock one suffers when he learns of the death or injury of a child . . . over the phone It is more than bad news. The kind of shock the tort requires . . . may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words

. . . .
The plaintiff must observe either the infliction of the fatal or harmful blow or observe the results of the blow after its occurrence without material change in the condition and location of the victim.
719 P.2d at 199, 201 (emphasis added).

Biercevicz v. Libery Mutual Ins. Co., 49 Conn. Supp. 175, 181, 865 A.2d 1267 (2004) (*Clohessy* recognized that limits had to be established in limiting the class of people who could sue for bystander distress).

witness their relative's injuries at the scene of an accident . . . shortly after it occurs and before there is material change in" the circumstances. 136 Wn.2d at 131-32. Recovery is limited to those bystander relatives who are present at the scene of the accident before the horror of the accident has abated.

The court went on to hold that a family member bystander might recover for distress caused by observing an injured relative at the scene of an accident before there is a substantial change in the relative's condition. The court held that these plaintiffs had a claim because they might have "witnessed their family members' suffering" before there was a substantial change in the victim's condition or location. 136 Wn.2d at 132.

Both the Hegels and Mr. Marzolf were present at the scene of the accident. The fact that both arrived in time to witness only the suffering, not the infliction of injury on their relatives, does not preclude their claims.

136 Wn.2d at 136.

C. MR. COLBERT’S BYSTANDER TORT CLAIM DOES NOT COME WITHIN WASHINGTON LAW.

We may begin where the *Hegel* court left off. Mr. Colbert witnessed neither the suffering of nor the infliction of injury on his daughter. He does not come within the class of individuals who may maintain a bystander tort claim.

After noting the necessity of putting one’s “own emotions aside” (RP 14), Judge Stolz succinctly summarized the law, the facts, and the result (RP 15):

The way the law is worded right now Mr. Colbert is not covered for emotional distress. He was called, went there, already advised she’s gone off the boat into the water and must have known it was a high probability she would have drowned. Watched the recovery effort for three hours but did not witness any pain, suffering or the like. A parent is going to be devastated any time their child dies before they do. Whether it’s heart attack, auto accident or a drowning accident. But this case is outside . . . the parameters of the law as it is now. And, therefore, I’ll grant the summary judgment motion.

A reading of the Washington case law on bystander tort claims reveals a thread running through all the discussions. It is the view that the court must keep a very tight rein on this tort as there exists the very real threat of unlimited liability. Public policy dictates that a reasonable limit on the scope of defendant’s liability must be imposed. In *Hunsley*, the court imposed a foreseeability limit. But the *Cunningham* court discerned that even that was too broad. Because a foreseeability limit alone was

contrary to public policy, the *Cunningham* court limited bystander tort claims to those made by relatives present at the time of the accident.

Gain applied that limitation to the facts of the case before it, noting that specific limitations had to be placed on the foreseeability standard. It agreed with *Cunningham* that a reasonable limit was required. But *Gain* also indicated that given a different set of facts, the class could include, in addition to those physically present at the scene of the accident, those who arrive shortly thereafter.

What was meant to be included by the phrase “shortly thereafter” was examined and explained in the *Hegel* opinion. In both parts of *Hegel*, the bystander relatives had come upon the injured relative and observed the severe injuries while the relative was still lying on the ground where the accident occurred. *Hegel* indicated that the bystander class could include those who arrive on the scene of the accident after the accident has occurred and who “witnesses the victim’s suffering.” 136 Wn.2d at 130. Mr. Colbert did not witness his daughter’s suffering.

In explaining why the line would not be drawn at those physically present at the time of the accident, the court mentioned the bystander witnessing a crushed body, the bleeding, the cries of pain, and the dying words. Mr. Colbert experienced none of these.

The court said the difficulty was to distinguish between the trauma suffered by the family member who sees the victim shortly after the accident, and the grief suffered by every relative who grieves for the victim. Mr. Colbert experienced the grief of a father for the loss of a child. He did not suffer the trauma of seeing the accident or the suffering of the victim.

The *Hegel* court identified and endorsed a principled intermediate approach which kept a limit on liability but allowed recovery to the bystander relatives who witness injuries at the scene shortly after they occur. The *Gates* opinion from Wyoming cited in *Hegel* explains how it operates:

[The shock] is more than the shock one suffers when he learns of the death or injury of a child . . . over the phone. . . . It is more than bad news. The kind of shock the tort requires . . . may be the crushed body, the bleeding, the cries of pain, and, in some cases, the dying words. . . .

Gates v. Richardson, 719 P.2d 193, 199 (Wyo. 1986) (emphasis added).

In the middle of the night, Mr. Colbert got the phone call every parent dreads. Your child disappeared in the lake. We can't find her. It is bad news. It is awful news. It is devastating news. But it is not the kind of news, the kind of shock, the tort requires. In order to limit the tort, the courts require more immediacy. The indicia of immediacy are absent here.

Hegel said that a family member bystander might recover for the distress caused by observing an injured relative at the scene before there was a substantial change in condition. Mr. Colbert did not observe his daughter until long after she had drowned. He did not witness his daughter suffering.

In fact, it appears that even those at the scene did not witness any suffering.

As Lindsay Lynam testified (CP 265):

A All of a sudden she was gone. We were just swimming, and then she went under. **There wasn't a struggle or anything.**

(Emphasis added.)

We end where we started, with Judge Stolz (RP 15):

Mr. Colbert is not covered for emotional distress. He was called, went there, already advised she'd gone off the boat into the water and must have known it was a high probability she would have drowned. Watched the recovery effort for three hours but did not witness any pain, suffering or the like. A parent is going to be devastated any time their child dies before they do. Whether it's heart attack, auto accident or a drowning accident. But this case is outside . . . the parameters of the law as it is now.

D. MR. COLBERT'S DISTRESS DOES NOT SATISFY THE BYSTANDER TORT CLAIM REQUIREMENT.

In the trial court and again on appeal, appellant confuses what injuries are recoverable in a bystander tort claim. Specifically, appellant substitutes his experience in observing the recovery effort for the experience of observing the accident or the experience of observing suffering of his daughter. He makes this substitution because he did not observe the accident; he did not observe any suffering; he did not experience any of the indicia of immediacy identified by *Hegel* and *Gates*. Not having experienced any of these, appellant does not have a bystander tort claim.

This unique tort is based on the plaintiff's immediate experience of the relative's suffering or death. Plaintiff's injury must be caused by his direct sensory perception of his loved one's suffering. Appellant spends much time describing Mr. Colbert's emotional suffering. But what is overlooked is that the tort requires that this emotional suffering be triggered by observance of the relative's suffering.

As Judge Stolz aptly observed: "A parent is going to be devastated any time their child dies before they do." Mr. Colbert was understandably devastated with the death of his child. But that emotional distress did not

arise from witnessing “any pain, suffering or the like.” That distress is not compensable under Washington law.

It goes without saying that Mr. Colbert was shocked and upset when he learned over the phone that his daughter had gone into the water and had not come up. But page 27 of appellant’s brief states that Mr. Colbert “was medically diagnosed as suffering from clinical depression.” The record cite for the statement is “CP 488.” Turning to that page, we find four pages from the deposition of Dr. Severtson.⁷ He was asked if he made a “psychological diagnosis” of Mr. Colbert. It appears he did not: “Not in the sense of a DSM 4 diagnosis. . . . I have not put a specific DSM 4 diagnosis. . . . I won’t use a specific label.” A careful reading of CP 488 reveals no mention of “clinical depression.”

This does not appear to meet the requirements of *Hegel*, 136 Wn.2d at 135:

We hold that to satisfy the objective symptomology requirement established in *Hunsley*, a plaintiff’s emotional distress must be susceptible to medical diagnosis and proved through medical evidence.

⁷ Dr. Severtson is a licensed clinical psychologist. (CP 486) He does not appear to be an M.D.

In *Hegel*, the court said that emotional symptoms of distress may be sufficient “if they can be diagnosed and proved through medical evidence.” 136 Wn.2d at 136.

The court said (136 Wn.2d at 135 n.5) that it agreed with *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993):

“[P]laintiff must show an ‘emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, **or any other type of severe and disabling emotional or mental condition** which may be generally recognized and diagnosed by professionals trained to do so.’”

(Emphasis added.)

Putting aside the lack of a medical diagnosis by a medical professional, we may note that Dr. Severtson did, in his declaration (CP 472-74), say that Mr. Colbert displayed extreme emotion with tears and signs of distress (CP 473), and that the MMPI-2 test showed extreme anxiety and depression (CP 473). This is not surprising. As noted by Judge Stolz, a parent is “devastated” anytime their child dies before they do. But that devastation, that extreme anxiety, is not what is required for bystander tort recovery. As we have seen above, the injury required under Washington law is that the bystander witness the accident, or arrive shortly thereafter and witness the suffering of the loved one. Mr. Colbert

was not present when his daughter drowned, nor did he arrive shortly after she drowned, nor did he witness any suffering on her part.

To circumvent this failure of proof, appellant misdirects attention to the stress of the recovery effort and the stress of witnessing the recovery of Ms. Colbert's body from the water. Neither one, whether taken together or separately, satisfies the requirements of a bystander tort claim. But even appellant's expert, Dr. Severtson, stated that Mr. Colbert's psychological condition would be the same, whether or not he had actually seen his daughter's body taken from the lake (CP 496):

Q: [Hypothetically,] Mr. Colbert spends . . . three hours at Mr. Peterson's house going through all the anxiety and fear, everything that's part of the experience. He sees the buoy pop up, and the divers have located the body. He's told by Chaplain Spar [sic] they've found her body. At that point he turns around. He does not see the body come onto the boat. Under those circumstances are we going to see anything different in his psychological profile today?

A: I don't think so, because he would have had the whole three-hour period and . . . you may not see it in a physical sense, but if you're a parent like Mr. Colbert is a parent, you will see it even though you don't see it.

Q: Right. The damage is done just from him being at the scene, regardless of whether he had seen the actual physical recovery?

A: Yeah. I think that's a small part of it, a very small part of it. You know, to see the actual physical recovery, if he did, is adding one more image, so to speak. But you can turn your back and you have a perfect image of what's

happening, and you know your daughter, and you know the circumstance and the situation.

(Emphasis added.) Mr. Colbert did not and cannot demonstrate that the act of seeing his daughter's body taken from the water—as distinguished from watching the recovery effort—was the proximate cause of his emotional disorders.

When we have sorted through all of the fine points, the fact remains that what caused Mr. Colbert's distress was not his personal sensory perception of his daughter's suffering. He did not witness "any pain, suffering or the like." His distress was the normal distress of a parent who has lost a child. It was not the distress of a parent who has witnessed the death of a child or the suffering of a child. His distress is not compensable under Washington law.

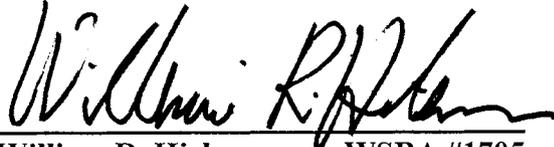
VI. CONCLUSION

Denise Colbert drowned in Lake Tapps. Her father grieves over the loss of his daughter. But he was not present when she drowned; he did not see her drowned; he did not witness her suffer. Under the law of the State of Washington, he has no claim for his grief.

Judge Stolz's summary judgment of dismissal should be affirmed.

DATED this 6th day of October, 2005.

REED McCLURE

By 

William R. Hickman WSBA #1705
Attorneys for Respondents Skier's
Choice, Inc., Moomba Sports, Inc.,
United Marine Corporation of
Tennessee, and American Marine
Corporation

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competent to be a witness therein; that on the date herein listed below,
affiant deposited into the U.S. Mail, postage prepaid and addressed to:

William Scherer Bailey
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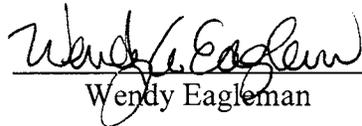
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copies of the following documents:

1. Brief of Respondents Moomba Sports, United Marine,
American Marine, and Skier's Choice; and
2. Affidavit of Service by Mail

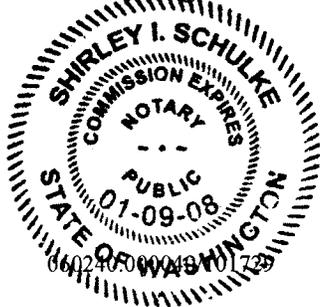
DATED this 6th day of October, 2005.

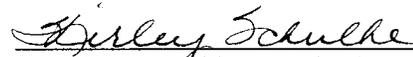


Wendy Eagleman

SIGNED AND SWORN to before me on 10-6-2005 by

Wendy Eagleman.





Print Name: Shirley Schulke
Notary Public Residing at Sammamish, WA
My appointment expires: 01/09/2008